EDITOR'S NOTE

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No. 91-1270

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANN RICHARDS, Governor of Texas, *et al.*,
Appellants,

v.

LOUIS TERRAZAS, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Western District of Texas

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MOTION FOR ESTABLISHMENT OF FIFTEEN-DAY DEADLINE FOR SUBMISSION OF THE VIEWS OF THE UNITED STATES

Ann Richards, Dan Morales, and John Hannah, Jr., respectively the Governor, the Attorney General, and the Secretary of State of Texas (appellants herein and hereinafter collectively termed "the state"), move the Court to establish a deadline of fifteen days for the Solicitor General to give the Court the views of the United States in this case. The grounds follow:

1. As events unfold in other forums or contexts dealing with the subject matter of this appeal -- Texas Senate redistricting for 1992 -- the likelihood of voter confusion and electoral uncertainty grows. Prompt guidance from this Court is the only readily apparent path toward eliminating the potentially debilitating uncertainty and confusion. The first crucial step toward prompt guidance is for the United States to promptly file the views which the Court requested on March 30, 1992. Thus far, the Court has set no deadline for the submission of such views. Setting the deadline requested here would insure that the views are available to the Court before it goes into summer recess in little more than a month.[1]

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[1] On May 18, 1992, the Court also invited the United States's views in the related case of *Slagle v. Terrazas*, No. 91-1546, in which the state also is a party.

2. The just-referenced unfolding events are outlined below:

a. On May 15, 1992, the Judicial Council of the Fifth Circuit[2] unanimously ordered the public reprimand of Judge James R. Nowlin for his improper actions in this very case. Judge Nowlin is the managing judge and was a determinative vote in the two-to-one decision before the Court in this appeal. The Judicial Council's order of reprimand and the special committee report whose findings, conclusions, and recommendations the Fifth Circuit Council adopted are attached and incorporated in this motion. Among the most important parts of the reprimand and report is the following passage, which is a precise restatement of the governing test for judicial disqualification under 28 U.S.C. § 455(a):

> For a judge of the court panel faced with resolving this controversy to privately call upon an elected member of the legislature for assistance in that task, regardless of how limited, would ***clearly have the appearance of impropriety for any reasonable observer.***

Order of May 15, 1992, Report at 25 (last sentence) (emphasis added). *Compare. Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194, 2202-03 (1988); *In re Contintental Airlines Corp.*, 901 F.2d 1259, 1262 (5th Cir. 1990) (§ 455(a)'s standard is "an objective one, that if a 'reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality' ") The Fifth Circuit council in its one-page order explicitly found the conduct of Judge Nowlin to be "inconsistent with the mandates of Canons 2A and 3A(4) of the Code of Conduct for United States Judges and . . . prejudicial to the effective administration of the business of the courts."

b. In *In re Slagle*, No. 91-1841, this Court is presented with the question of whether it or the Fifth Circuit has jurisdiction to decide whether a writ of mandamus should issue requiring Judge Nowlin to recuse himself from the

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[2] The Judicial Council of the Fifth Circuit is composed of ten currently sitting, active members of the Fifth Circuit and nine currently active, sitting district judges in the Circuit. One of the appellate judges recused himself.

Texas Senate redistricting case (as well as two related Texas redistricting cases). The *Slagle* case arrived here through the rarely-invoked certified question procedure after the Fifth Circuit was asked to effectively overrule Judge Nowlin's denial of the State's and Slagle's motions for his recusal, which motions arose out of the facts forming the basis for the public reprimand noted in ¶ 2.a, above.

c. The case from which this appeal arises, *Terrazas v. Slagle*, Civ. Action No. A-91-CA-426, still pends below. Despite the public reprimand of May 15th and the finding quoted in ¶ 2.a, above, Judge Nowlin has not yet recused himself. Yet, there is a strong possibility that the three-judge district court panel will be faced with a crucial decision in the relatively near future because the preliminary injunction has expired by its own terms (with the conclusion of the state party primaries on April 14, 1992) and the state (at least as of today) has no precleared Senate redistricting plan of its own to implement for the Senate general elections, which formally commences with the opening of personal appearance early voting on October 14, 1992. That is, as things now stand and without further judicial action, the state is faced with uncertainty about whether there is any authority for it to go forward with the Senate general elections. It may very well be that the district court below in *Terrazas v. Slagle* may be called upon to act on the merits on questions pertaining to Senate redistricting before this Court convenes to open its 1992 term on October 5, 1992 (only nine days before voting formally opens for general election voting for the Texas Senate). Judge Nowlin's possible role in such action remains unknown but his refusal thus far to recuse himself, notwithstanding the clear language of the public reprimand, raises the probability that he will continue to play an active role in this case.

d. The Attorney General of the United States, through his Assistant Attorney General for Civil Rights, has refused to grant section 5 preclearance to the Texas legislature's previously-precleared Senate redistricting plan, offering as his

sole ground the global, undifferentiated finding of a section 2 violation in the order before the Court in this appeal. As a consequence of the United States Attorney General's preclearance denial, a three-judge panel of the United States District Court for the District of Columbia is hearing the section 5 preclearance case of *Texas v. United States*, No. 91-2383, which is proceeding toward trial (formal discovery having ended on May 15, 1992). As posed by the district court, the issue to be tried in that case has devolved into which of two Senate redistricting plans (the Texas Legislature's or the *Terrazas* court-ordered interim plan now before this Court) offers superior protection to minority voters in Texas. *See Texas v. United States*, 785 F.Supp. 201 (D.D.C. 1992).

3. The status quo threatens chaos for Texas Senate general elections. Requiring the United States to offer the Court its views within the next fifteen days makes it at least possible for the Court to summarily address the merits of this case before it breaks for the summer. The consequence of the Court's not doing so is that the state and its voters must spend the summer wrestling with the specter of not having any state Senate general election this fall, or that there will be such an election but only as a result of a federal court order issuing in part from a federal judge who has already been told by his peers on the judicial council that his participation denies the appearance of fairness and propriety to judicial decrees. The state urges the Court to help it avoid either of these consequences and, as a first step in this direction, imposing a fifteen-day deadline on the United States to tell the Court what it thinks of this case.

Based upon the foregoing matters, the state urges the Court to grant this motion.

Respectfully submitted,

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May 20, 1992

THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

Before: Henry A. Politz, Chief Judge; Carolyn Dineen King, Will Garwood*, E. Grady Jolly, Patrick E. Higginbotham, John M. Duhé, Jr., Jacques L. Wiener, Jr., Rhesa H. Barksdale, Emilio M. Garza, and Harold R. DeMoss, Jr., Circuit Judges; Morey L. Sear, John V. Parker, F. A. Little, Jr., Neal B. Biggers, Jr., Henry T. Wingate, Mary Lou Robinson, George P. Kazen, William Wayne Justice, and H. F. Garcia, District Judges.

IN RE: The complaint of Lewis H. Earl against United States District Judge James R. Nowlin under the Judicial Conduct and Disability Act of 1980.

U.S. COURT OF APPEALS
FILED
MAY 15 1992
CLERK

ORDER

After due consideration of the attached report of the investigative committee appointed in this matter, and the evidence upon which that report is based, the Council adopts the committee's findings and conclusions and approves and accepts its recommendation for the disposition of this complaint. For reasons stated in the report, the Council reprimands Judge Nowlin for his conduct. It further admonishes Judge Nowlin that his actions described in the report are inconsistent with the mandates of Canons 2A and 3A(4) of the Code of Conduct for United States Judges and are deemed prejudicial to the effective administration of the business of the courts. It is imperative that Judge Nowlin exercise greater care in such matters in the future and he is so directed.

FOR THE COUNCIL

Henry A. Politz
Chief Judge, Fifth Judicial Circuit

May 15, 1992

* Recused

UNITED STATES COURT OF APPEALS
Fifth Circuit

DATE: May 5, 1992

TO: The Fifth Circuit Judicial Council

SUBJECT: Report of Special Committee of the Fifth Circuit Judicial Council on Complaint of Lewis H. Earl against Judge James R. Nowlin

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I. Background

Lewis H. Earl of Post, Texas, filed a complaint on January 21, 1992, with the Fifth Circuit Judicial Council against Judge James R. Nowlin. On February 5, 1992, Chief Judge Henry A. Politz dismissed the complaint. On February 10, however, the Chief Judge vacated his earlier order and directed that the complaint be investigated by a special Committee. As required by 28 U.S.C. § 372(c)(4)(A), the Chief Judge appointed himself and an equal number of circuit and district judges to the Committee, appointing Circuit Judges W. Eugene Davis (Chairman) and Harold R. DeMoss, Jr.; and District Judges William Wayne Justice and George P. Kazen.

The charge against Judge Nowlin relates to his conduct while serving as a member of a three-judge district court empaneled to preside over consolidated lawsuits, bearing docket numbers A-91-CA425, 426, and 428, commonly referred to as the Terrazas litigation. The Terrazas plaintiffs seek to reapportion the Texas legislature because of alleged violations of the Voting Rights Act and the Constitution.

The Terrazas suits were filed in May 1991 and were lodged in Judge Nowlin's division. At Judge Nowlin's request, then-Chief Judge Charles Clark empaneled a three-judge court and designated Circuit Judge Will Garwood and District Judge Walter Smith to sit with Judge Nowlin on the case. Judge Nowlin was the managing judge for the litigation. Following discovery and other pretrial activity, the court conducted a four-day preliminary injunction hearing during December 10-13, 1991. The three-judge panel issued a preliminary injunction on December 24, 1991, imposing an interim redistricting plan for the 1992 election.

Shortly after the preliminary injunction issued, the Attorney General of Texas and other unsuccessful litigants in the Terrazas litigation began to complain of misconduct by Judge Nowlin and his staff. The core of the complaint was that Judge Nowlin had consulted State Representative George Pierce and enlisted his assistance in drawing the court-ordered redistricting plan. Mr. Earl also complained of communication between Judge Nowlin and Chief Justice Phillips of the Texas Supreme Court. The complaints received extensive press coverage. A number of motions based upon these facts, including motions to recuse Judge Nowlin, were filed in the Terrazas litigation.[1]

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[1]The motion to recuse was denied. An application for a writ of mandamus has been filed and is currently pending before a panel of the Fifth Circuit. The Committee expresses no opinion on the issue of recusal.

II. The Committee's Investigation

Shortly after the Chief Judge convened this Committee, the Texas Attorney General's office furnished us with copies of statements, depositions, and other exhibits it had obtained. After reviewing the investigative material and press clippings furnished us, the Committee immediately arranged to take Judge Nowlin's sworn testimony. All members of the Committee met in New Orleans and took Judge Nowlin's testimony on the morning of February 28.

We then arranged to take additional statements in Austin, Texas, on March 5, 1992. On that day, with all Committee members present, we took the sworn statements of the following witnesses: Britt Buchanan and J.D. Munn, law clerks to Judge Nowlin; Tina Hengst, computer operator at the Texas Legislative Council; Texas State Representative George Pierce; Michelle Bray, law clerk to Judge Garwood; Judge Will Garwood; and Judge Walter Smith. We also received a letter from Chief Justice Tom Phillips of the Texas Supreme Court in response to our inquiry about the circumstances surrounding this complaint.

III. The Facts

Based upon our investigation, we relate below the relevant facts that bear on the complaint against Judge Nowlin.

Judge Nowlin served in the Texas legislature for nearly 13 years prior to his appointment to the United States District Court in late 1981. While in the Texas legislature, Judge Nowlin represented a district in Bexar County that included the affluent towns of Alamo Heights and Terrell Hills, which are surrounded by

the City of San Antonio. When the Terrazas litigation was filed, Judge Nowlin learned from some of his acquaintances in the legislature that the Texas Legislative Council (TLC), an arm of the legislature, had acquired a sophisticated computer program that was very helpful in drawing district maps. In the weeks before the December 10 hearing, Judge Nowlin made arrangements for the three-judge court to have an account on TLC's computer system, called the RED.APPL (pronounced red apple) system. The RED.APPL's database contains extensive geographic and demographic information essential for redistricting. The three-judge court had two accounts on the RED.APPL system. These were called NOWL and NOW2. Each of these accounts can be considered a separate file in which information, maps, or similar documents can be stored and then called up when needed. Maps and other data from three proposed redistricting plans were entered in these accounts: (1) the Senate plan adopted by the Texas legislature in the 1991 regular session (SB-31); (2) the plan proposed by the plaintiffs (plaintiffs' plan); and (3) the Quiroz plan, a plan proposed in a consent judgment of a Texas state court.

Three law clerks worked on the RED.APPL system: Britt Buchanan and J.D. Munn from Judge Nowlin's chambers, and Michelle Bray from Judge Garwood's chambers. Britt Buchanan was the clerk from Judge Nowlin's chambers with primary responsibility for working on the redistricting plan; J.D. Munn spent very little time working on it. Judge Nowlin instructed his clerks to work primarily with the plaintiffs' plan as a starting point and make

modifications to that plan on the NOW2 account. Judge Garwood instructed Ms. Bray to use the SB-31 legislative plan as a starting point and make modifications to that plan on the NOWL account.

Law clerks needing to work on the RED.APPL system were required to make an appointment with TLC for computer time. When they arrived at the appointed hour a computer operator met them in the lobby of the computer area. The operator used an entry card to gain entry to the computer rooms and the law clerk logged in. The law clerk and the operator would then enter the separate computer room. The law clerk would instruct the operator to enter the name of the account (i.e., NOWL or NOW2) upon which he or she desired to work. After the operator entered the account name, the operator would turn the keyboard to the law clerk who would then enter the password. Although the account name appeared on the screen, the password did not. Thus, no one could gain access to either account without the proper password, and only the court personnel allegedly knew the password.

Once the account name and password were entered, the law clerk was ready to work on the account. Most of the work related to maps, which were part of the plans proposed by the litigants. In working with these maps and changing district lines, the law clerk directed the operator to make a change in a district line by pointing to the map on the screen and directing the operator where to move the line. The operator would then, by use of a "mouse," move the district line until it was in the desired location. The relevant voter population and racial and ethnic information would

print out on the screen so that the clerk could see what results had been accomplished by the change.

Much of the work was by trial and error, and the law clerk would continue to make changes until the voting population figures reached the desired level. When a law clerk completed his or her work on the RED.APPL for the day, the operator ordinarily would print out a map showing the geographic location of the district lines. A separate printout showed the ethnic and racial voting population composition. The law clerk then took this printout back to chambers for consultation with the judge.

With this background, we now turn to the specific facts giving rise to the complaint.

A.

Representative George Pierce served with Judge Nowlin in the Texas House of Representatives from approximately 1979 until Judge Nowlin was appointed to the district court in 1981. The two were acquainted before that, however, because Pierce worked as a staff member to various legislative committees before 1979, while Nowlin was a representative. During the 1980-81 redistricting process, Rep. Pierce was actively involved in drafting various plans proposed at that time, and developed considerable skill and familiarity with the use of computers in the preparation of redistricting plans. Judge Nowlin knew of Rep. Pierce's skill and intense interest in the use of computers for this purpose; he considered Pierce a "computer nut". During the two years they were both members of the House, they did not serve on the same

legislative committees. Although the two men were not close friends and did not visit in each other's homes, they had some contact because they were both Republicans serving from the San Antonio area.

After Judge Nowlin was appointed to the district court, he had very little contact with Rep. Pierce before this redistricting suit was filed. After this suit was filed, Rep. Pierce first made contact with Judge Nowlin in late November 1991, after a Texas state court adopted a redistricting plan (the Quiroz plan). He called Judge Nowlin to complain about the state-ordered plan and to inquire about the federal action. Judge Nowlin told him that a hearing had been set for December.

During the course of their conversation, Rep. Pierce told Judge Nowlin that he was not going to seek re-election. Pierce told him that his combined years in the House and other state employment offered him a good retirement and that his wife wanted him to retire. Judge Nowlin understood from this conversation that Pierce was leaving political life. Judge Nowlin knew that one was not eligible to receive retirement benefits under the Texas retirement plan while holding public office in Texas.

The next conversation Rep. Pierce had with Judge Nowlin was shortly after the three-judge court hearing of December 10. It was common knowledge in the legislature that the court was drawing a plan on TLC's RED.APPL computer system. Pierce called Judge Nowlin to tell him that he did not think that the court's work product was secure on the RED.APPL system. He told Judge Nowlin that he

believed TLC had the ability to gain access to the court's work in progress. A series of other minor contacts followed. Rep. Pierce stopped by Judge Nowlin's office on one occasion, but Judge Nowlin was not there and did not see him. Rep. Pierce had intended to ask Judge Nowlin if an opinion was imminent. The next conversation was on Saturday, December 20, or Sunday, December 21. On this occasion, Judge Nowlin called Pierce to complain that Bob Kelly, the executive director of TLC, had failed to show up for an appointment. Judge Nowlin had scheduled a meeting with Mr. Kelly at the TLC office after Kelly proposed that TLC review the court's plan for technical errors, such as omission of a voting precinct. This failure of Mr. Kelly to maintain the appointment with Judge Nowlin increased Judge Nowlin's concern, prompting Judge Nowlin's call to Rep. Pierce to ask him to check on Kelly.

The next meeting between Rep. Pierce and Judge Nowlin, and the events related to that meeting, form the basis of the complaint at issue here. On the morning of December 23, Judge Nowlin and his staff were busily engaged in preparing a proposed draft opinion for the three-judge court. This included putting the final touches on the district lines of the plan Judge Nowlin planned to propose to his fellow judges. In making his final review of this Senate plan, he decided to move two affluent small cities, Alamo Heights and Terrell Hills, out of minority District 19 and put them in majority District 26. Judge Nowlin was familiar with these two towns because he had represented them in the Texas legislature.

Rep. Pierce stopped by Judge Nowlin's chambers around mid-morning on December 23 to report on his attempt to locate Mr. Kelly. After doing so, Judge Nowlin discussed with Pierce the change he had decided to make in Senate Districts 19 and 26. Judge Nowlin told Rep. Pierce that he wanted to move Alamo Heights and Terrell Hills from District 19 to District 26. Judge Nowlin testified that he also told Rep. Pierce that a loosely defined community known as Castle Hills would have to be moved from District 26 to District 19. According to Rep. Pierce, Judge Nowlin did not specify what areas he wanted moved out of District 26, nor did he mention Castle Hills. Judge Nowlin and Rep. Pierce did not discuss the location of the residences of any incumbents in the Texas legislature.

Judge Nowlin decided to send Rep. Pierce and one of the judge's law clerks to make the desired changes on the RED.APPL system. Britt Buchanan, Judge Nowlin's clerk most familiar with the redistricting case, was working on a draft of the proposed opinion. Judge Nowlin decided to send his second clerk, J.D. Munn, and called Mr. Munn into his chambers where he was speaking with Rep. Pierce. Judge Nowlin instructed Mr. Munn to accompany Rep. Pierce to TLC to make changes in Senate Districts 19 and 26 in Bexar County. Mr. Munn testified that he recalled hearing Judge Nowlin tell his co-clerk, Britt Buchanan, about a week earlier that he wanted to move some neighborhoods in San Antonio, and that he specifically heard Judge Nowlin mention Alamo Heights. Mr. Munn assumed that the changes the Judge had talked with Rep. Pierce

about related to that earlier conversation. Although Mr. Munn was not informed as to the specific changes to be made, he thought that Judge Nowlin had told Rep. Pierce what changes to make.

Judge Nowlin testified that he sent Rep. Pierce with Mr. Munn because of Pierce's dual familiarity with computers and the communities around San Antonio. Mr. Munn was unfamiliar with the San Antonio area. Judge Nowlin felt that Rep. Pierce's help at TLC would speed up the process. Judge Nowlin instructed Mr. Munn to bring back to chambers for the court's review a map and printout of the changes he and Rep. Pierce made.

Mr. Munn proceeded to TLC with Rep. Pierce, as instructed. They gained access to the computer room in the usual way, as described above. Tina Hengst, one of the TLC operators, met them in the lobby and used her card to gain entry into the computer area. Mr. Munn then signed in on the log book. The computer operator entered the NOW2 account, as instructed by Munn. Mr. Munn then entered the password. After the operator pulled up the account, Mr. Munn made some changes in accordance with Judge Nowlin's instructions that were unrelated to the Bexar County changes under discussion here. Rep. Pierce had nothing to do with those changes.

After Mr. Munn finished these changes, he and Rep. Pierce changed positions so that Rep. Pierce could direct the computer operator. The operator, at Rep. Pierce's request, then zoomed in on Bexar County. Rep. Pierce proceeded to give instructions to Ms. Hengst. He showed Ms. Hengst on the map what areas to move out of

District 19. This included generally the area within the city limits of Alamo Heights and Terrell Hills, plus some adjacent areas that were within the Alamo Heights Independent School District. He then instructed Ms. Hengst to move Voting Tabulation Districts (VTDs) in District 26 that were closest to District 19 into District 19 to make up for the VTDs that had just been moved out of District 19. Castle Hills was one of the communities moved from District 26 to District 19. Rep. Pierce made two or three moves before he restored the total voting populations in the two districts to the required levels, and minority voting population in District 19 to the desired level. Rep. Pierce directed Ms. Hengst on the computer for approximately 20 to 30 minutes.

After these changes were made, Ms. Hengst gave Mr. Munn a printout of a map reflecting the districts as modified. She also gave him a printout of the new demographic statistical information. Mr. Munn took the map and additional information back to Judge Nowlin.

The changes Rep. Pierce and Mr. Munn made to Senate Districts 19 and 26 the morning of December 23 produced a slight increase in the percentage of Hispanic voting-age population in District 19, from 55.78% to 56.26%, and an increase in minority (black and Hispanic) voting-age population from 60.37% to 60.69%. The Pierce/Munn changes also resulted in a slight decrease, from 19.16% to 18.89%, in the percentage of minority voting-age population in District 26, which was already a majority Anglo district.

The only portion of the court's work product Rep. Pierce observed was the Senate districts in Bexar County located in the NOW2 account. The NOWL account was not displayed to Rep. Pierce. In making the changes to Districts 19 and 26, Rep. Pierce did not call up on the computer screen the location of the residences of any incumbent members of the Texas Senate or House of Representatives.

During the afternoon of December 23, Judge Garwood and Judge Nowlin met to discuss the final opinion and court redistricting plan for the entire State. They conferred at length with Judge Smith on the telephone. The judges agreed to adopt the plan that had been drawn on the NOWL account with certain modifications to be made that afternoon. Among those modifications were the changes to Senate Districts 19 and 26 discussed above. Judges Garwood and Smith explained that the increase in minority voting population in District 19, the minority district, was their reason for approving the changes. Neither Judge Garwood nor Judge Smith had any knowledge that Rep. Pierce had played a role in making the changes in these two districts.

Shortly after 5:00 p.m. on December 23, Britt Buchanan and Michelle Bray went to the TLC office to make the final changes on the maps in the NOWL account. They attempted to duplicate in the NOWL account the changes Rep. Pierce and Mr. Munn had made to Senate Districts 19 and 26 in the NOW2 account earlier that day. Thus, except for minor errors the law clerks made in duplicating the NOWL map of Bexar County showing Senate district lines, the

changes Rep. Pierce made, at Judge Nowlin's direction, in Districts 19 and 26 became part of the final plan adopted by the court.

Rep. Pierce formally announced on January 8, 1992, that he would seek election to the Senate from District 26. Pierce designated his campaign treasurer with the Texas Secretary of State that same day. When Texas officials learned that Pierce had played a role in modifying Senate District 26 on December 23 and that he had announced his candidacy for this district, obvious inferences were drawn. The Attorney General of Texas and others concluded that Judge Nowlin allowed his former colleague to draw himself a safe Senate district.

B.

In evaluating Judge Nowlin's conduct, one of the central questions that concerns us is whether Judge Nowlin knew or suspected on December 23, 1991, that Rep. Pierce was considering running for a legislative office, particularly a seat in the Senate from District 26.

As stated above, Judge Nowlin, in his testimony to us, asserted that Rep. Pierce told him in late November 1991 that he intended to retire from the legislature. According to Judge Nowlin, Pierce told him that he was eligible for retirement and that his wife had insisted that he retire.

Rep. Pierce, in his sworn statement to this Committee, confirmed this discussion with Judge Nowlin. He asserted that in his conversation with Judge Nowlin in late November 1991, he told Judge Nowlin that he was not going to run again. Rep. Pierce told

Judge Nowlin that he was eligible for a good retirement, and his wife wanted him to retire. According to Pierce, this would have made it plain to Judge Nowlin that he did not intend to run for any legislative office because everyone familiar with the system knows that one must be out of office to be eligible for retirement. Rep. Pierce told us further that he had no reason to believe that Judge Nowlin had any knowledge before December 1991 of any plans he might have had to run for the Senate. This statement may be read as contradictory to a statement Pierce made in his February 3, 1992, deposition taken by the Texas Attorney General in connection with the Terrazas litigation. Rep. Pierce testified as follows in that deposition:

> Q: Would it be possible that Judge Nowlin would have been aware of your interest in a Senate race within the last six months?
>
> A: Sure. Let's face it, we are friends . . .
>
> Q: So it's your belief that he would have been aware of your interest in seeking a Senate race within the last six months?
>
> A: Sure, it's been in the newspapers. It's been in publications. It's been put out everywhere.

We questioned Rep. Pierce about this apparent inconsistency. He testified that he understood the question in the deposition to address Judge Nowlin's knowledge of his interest in the Senate seat within the six-month period preceding his February deposition. Rep. Pierce stated to us that when he answered the question in the deposition, he was thinking of knowledge Judge Nowlin obviously acquired from extensive press coverage in January and February 1992 about this incident. In other words, Rep. Pierce stated that he

was addressing his impression of Judge Nowlin's knowledge during the weeks preceding the February 3 deposition and not during November and December 1991.

The Texas Attorney General points to an earlier reference by Pierce in his deposition that he had begun to formulate an interest in running for the Senate about a year before his deposition was given. Rep. Pierce explained to us, however, that while he indeed had expressed interest in running for the Senate in early 1991, he later changed his mind.

We also questioned Rep. Pierce about what ultimately made him decide to run for the Senate from District 26. He stated that when it became apparent to him that the only candidate for the Senate seat from Bexar County was Alan Schoolcraft, he decided to run. This fact was critical to his decision because of his impression that Alan Schoolcraft was not a strong candidate. Rep. Pierce concluded that if he did not run, the District 26 senator would come from one of the counties north of Bexar County, and he did not want to see Bexar County lose this Senate seat.

The Fifth Circuit librarian, at our request, investigated whether any newspaper articles appeared in Austin or San Antonio before December 23, 1991, concerning Rep. Pierce's plans to run for the Senate. She found no articles in any Austin newspaper. She did find articles in the San Antonio Light in May, June, and December 1991 discussing the possibility that Pierce would run for the Senate.

Judge Nowlin does not subscribe to or regularly read a San Antonio newspaper. We find no reason to believe that Judge Nowlin had knowledge of the articles in the San Antonio Light suggesting that Pierce might run for the Senate. We also find no reason to discredit Judge Nowlin's statement that Rep. Pierce told him in unequivocal terms that he had no plans to run for any legislative office. Rep. Pierce's sworn statement to our Committee on this point fully confirms Judge Nowlin's testimony. Rep. Pierce's explanation of his arguably inconsistent prior testimony is not implausible. The prior testimony was in response to a question inviting Rep. Pierce to speculate about Judge Nowlin's knowledge, and the question was ambiguous with respect to the time frame in which Judge Nowlin's knowledge was to be evaluated. We conclude that, whatever Pierce's actual political intentions may have been in December 1991, Judge Nowlin did not regard Pierce as a candidate for the state Senate at that time.

Moreover, the evidence clearly establishes that the changes to Districts 19 and 26 were initiated by Judge Nowlin, not by Rep. Pierce. Judge Nowlin was intimately familiar with Terrell Hills and Alamo Heights. He neither needed nor sought input from Pierce on whether those two entities had more in common with District 19 or 26. Judge Nowlin felt some loyalty toward the two towns because he had represented them in the legislature. Judge Nowlin believed, correctly, that by transferring these two towns to District 26, he could place those entities in a District of what he perceived to be

more common interests, and simultaneously increase the minority voting population in District 19.

The evidence further reflects that in agreeing to implement Judge Nowlin's instructions, Rep. Pierce was not enhancing his own electability. Pierce testified persuasively that Senate District 26, as finally drawn, was not a district from which he could easily win.[1] Alan Schoolcraft, a potential District 26 candidate, had represented Alamo Heights and Terrell Hills for some time in the Texas House of Representatives. On the other hand, Rep. Pierce's core supporters came from the Castle Hills area, which he took out of District 26 and put into District 19. Indeed, one of the documents that tracked the changes Rep. Pierce directed on December 23 demonstrates that Rep. Pierce moved more VTDs from Castle Hills than were necessary. The computer-generated tracking device shows that, after the populations of Districts 19 and 26 were within 5% of the desired level (which is all that is required), additional voting precincts were shifted out of District 26 into District 19. When we examined the historical voting patterns of the VTDs Rep. Pierce moved out of District 26, particularly those he moved unnecessarily, the records indicated that those voters strongly supported Rep. Pierce.

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[1]Although we do not discount the political damage to Rep. Pierce from the extensive publicity surrounding these changes, we observe that later events bore out his pessimism. In the March 1992 primary, Rep. Pierce ran fourth in a five-person race, garnering 8% of the vote.

Although the above charge is the central one made against Judge Nowlin, Mr. Earl and the Attorney General of Texas make three additional, somewhat related charges that require discussion.

First, the complainants charge that Rep. Pierce and a number of other members of the Texas legislature made multiple telephone calls to Judge Nowlin. This is supported by computer records that automatically document each call made from legislative offices in Austin. The computer record shows both the calling number and the number called, as well as the approximate length of the call. The record does not, however, identify either the person who originated the call nor the person who answered the call. The relevant records reflect approximately 22 calls from Rep. Pierce's office to Judge Nowlin's chambers. Almost all of these calls are shown as lasting two to three minutes. In addition to these calls, the records reflect a large number of calls in the two-to-three minute range from twelve other state legislators. We note initially that the telephone call recorder registers all calls made, not just completed calls, and that its minimum register is two minutes, even if a call actually lasts only a few seconds.

Our investigation revealed that Judge Nowlin seldom personally answers the telephones in his chambers. The telephone is answered either by the secretary, a law clerk, or an answering machine. Frequently, when Judge Nowlin and his staff are busy, they activate the answering machine. Rep. Pierce's calls to Judge Nowlin that exceed two or three minutes are accounted for and are discussed

above. The law clerks, as well as Judge Nowlin, testified that while the redistricting suit was in progress, his office received multiple calls daily from members of the public including members of the state legislature seeking a progress report on the suit. The caller typically was interested in knowing the date the court would reach a decision. Some of these calls were taken on the answering machine and the caller spoke with no one. On other occasions, the caller spoke with the secretary or a law clerk. From the evidence and our independent knowledge of the acute interest the public holds for litigation of this type, we have no reason to doubt this explanation for the multiple calls made from legislative offices to Judge Nowlin's chambers. We therefore drew no inferences of impropriety by Judge Nowlin from this evidence.

Mr. Earl, and some reports from the press, also complain about contact between Judge Nowlin and Chief Justice Tom Phillips of the Texas Supreme Court. Judge Nowlin and Chief Justice Phillips have given the Committee a consistent, plausible explanation for this contact. The Texas Supreme Court had before it a writ application seeking review of the state district court consent judgment that imposed the Quiroz plan. On December 3, 1991, Chief Justice Phillips contacted Judge Nowlin and asked Judge Nowlin to postpone commencement of his hearing until the afternoon of December 10 so that counsel could appear before the Texas Supreme Court for argument of that appeal. Judge Nowlin, Judge Garwood, and Judge Smith discussed the effect of the state court judgment and whether they should wait until the Texas Supreme Court reviewed the Texas

District Court order before proceeding with the suit pending before the three-judge court. Later, Judge Nowlin contacted Chief Justice Phillips to inquire whether the Supreme Court had issued a decision on its review of the Quiroz plan. On December 17, 1991, Chief Justice Phillips called Judge Nowlin immediately after the Texas Supreme Court released its opinion.

We find no impropriety in the contacts between Judge Nowlin and Chief Justice Phillips. The conversations did not relate to the merits of the litigation. Rather, they were for the purpose of coordinating hearings in the related litigation and learning when the Texas Supreme Court issued its opinion.

D.

Finally, the Attorney General and the press have suggested that Judge Nowlin permitted Rep. Pierce to alter District 26 to place the residences of some of his potential opponents for the Senate seat outside of District 26. These potential opponents include Cyndi Krier, Jeff Wentworth, and Alan Schoolcraft.

We note initially that residence inside a senatorial district is not a requirement for eligibility to run in that district under the court's redistricting plan. Rather, candidates may run for any district regardless of their place of residence. Nevertheless, living outside the district in which a candidate runs can be an obvious political liability.

We are persuaded from the evidence that Judge Nowlin had no intention to move any of these potential Senate candidates' residences outside any particular district. Judge Nowlin and Rep.

Pierce did not discuss the location of residence of any incumbents. The law clerks who did most of the work on the computer testified that they had no knowledge of the location of the residences of any of these potential candidates. They also denied receiving any instructions from Judge Nowlin to fix the lines in such a way as to place the residences of these candidates either in or out of any particular district.

Rep. Pierce also denied considering the residences of any of these potential candidates when he moved the lines for Districts 19 and 26. Pierce's changes apparently moved Jeff Wentworth and Cyndi Krier's residences from District 26 to District 19. Their residences were near the District 19 line and Castle Hills. Once Castle Hills was moved into District 19, their residences would have logically moved into District 19. In other words, Rep. Pierce simply moved adjacent VTDs from District 26 into District 19; no apparent irregularity is presented about which VTDs were moved from District 26 to District 19. We reiterate that the locations of incumbents' residences were not displayed to Rep. Pierce on the RED.APPL system on December 23.

Alan Schoolcraft's home was in the northeastern corner of Bexar County. A single VTD, which included his residence, was moved from District 24 into District 26. We draw no negative inference from this isolated change, however, for two reasons. First, Rep. Pierce was not involved with this decision. As we interpret the testimony and the computer records, this change was made around 5:00 p.m. on December 23 by Britt Buchanan, who

apparently was trying to increase minority representation in District 24. Second, the change in Mr. Schoolcraft's VTD placed his residence inside of District 26, it having been in District 24 in previous maps. Obviously, it would have been against Rep. Pierce's interest to move a potential rival into the District from which Pierce intended to run.

We find no merit, therefore, to the complaints that are predicated on these three latter grounds. We do, however, find substance to the first complaint discussed above, which we analyze below.

III. CONCLUSION AND RECOMMENDATION

The Judicial Council must determine whether Judge Nowlin "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1). We believe it may be helpful to consider first some of the charges leveled against Judge Nowlin that have not been established. We find no evidence that Judge Nowlin had a corrupt or evil motive in asking Rep. Pierce to assist in altering the court's redistricting plan. As indicated above, we do not believe that Judge Nowlin knew in December 1991 that Rep. Pierce planned to run for a legislative seat in 1992. Moreover, Judge Nowlin did not intend to allow Rep. Pierce to draw himself a favorable Senate district from which to run. We conclude that Judge Nowlin was rushing to get his proposed opinion in final form to present to his fellow panel members later that day so that it could be released before Christmas. He had confidence in Rep. Pierce, who was very

knowledgeable about computer redistricting and about the geography of Bexar County. It would have taken Mr. Munn and Ms. Hengst, acting alone, much longer -- perhaps several hours -- to accomplish the same changes Rep. Pierce was able to complete in thirty minutes. The use of Rep. Pierce allowed Judge Nowlin to obtain the map of the new Districts 19 and 26, along with the statistical information, in time for his meeting with his fellow judges on the afternoon of December 23. We also find that Rep. Pierce's involvement was limited to Districts 19 and 26 and that he had no input of any kind with respect to any other part of the redistricting plan in any other part of the State.

We are persuaded, however, that Judge Nowlin made a serious mistake in judgment when he asked Rep. Pierce to assist in making changes in a portion of the court's redistricting plan. Although Judge Nowlin reviewed and approved the changes Rep. Pierce made, Pierce, unfortunately, enjoyed latitude in deciding precisely what areas to move in the two Districts. Judge Nowlin gave no instructions to his law clerk, J.D. Munn, as to what changes should be made to Bexar County. Although Judge Nowlin's instructions to Rep. Pierce were general in nature, Pierce understood what Nowlin wanted him to do: move Alamo Heights and Terrell Hills from District 19 to District 26 and compensate District 19 by moving the adjacent areas of then District 26 (primarily Castle Hills) from District 26 into District 19. Both Judge Nowlin and Rep. Pierce must have realized that Pierce would need to engage in some trial and error exercises to accomplish this switch. This was the only

way Rep. Pierce could achieve the required total population levels in the two districts and at the same time increase the minority voting population in District 19.

Judge Nowlin's conduct was inconsistent with the limitation of Judicial Canon 3A(4)[3] that prohibits ex parte communication with a party interested in pending litigation. Rep. Pierce obviously was someone with a potential and, as it developed, actual legal interest in the proceeding. Even if Rep. Pierce could have been considered a "disinterested expert," Judge Nowlin did not disclose his contact with Pierce to the parties, as required by Canon 3A(4). We stress that the "communication" between Judge Nowlin and Rep. Pierce was not the kind one normally contemplates in connection with this Canon. As we have previously indicated, there is no evidence that Judge Nowlin solicited or received any advice, as such, from Rep. Pierce with respect to the redistricting. We have also previously noted that the initiative for moving Alamo Heights and Terrell Hills came from Judge Nowlin, who requested Rep. Pierce to implement this change in much the same way that he might have

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[3] Canon 3A. Adjudicative Responsibilities

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications on the merits or procedures affecting the merits of a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

instructed a law clerk. Nevertheless, we have also concluded that Rep. Pierce was afforded discretion in carrying out his charge, particularly with respect to compensating District 19 for the areas to be moved out. The end result of Rep. Pierce's efforts were then printed and thereafter "communicated" to Judge Nowlin via Mr. Munn. This "communication" was then considered by Judge Nowlin and essentially incorporated into the final plan.

Judge Nowlin's conduct was also inconsistent with the admonitions of Canon 2A, which constrains a judge to avoid not just impropriety but also the "appearance of impropriety" in order to avoid erosion of public confidence through "irresponsible conduct by judges." Judge Nowlin should have realized that allowing Rep. Pierce to participate in drawing district lines would give a serious perception of impropriety. As a member of the legislative body being redistricted, Rep. Pierce had a keen interest in the process. Although Judge Nowlin was convinced that Rep. Pierce had no intention of being a candidate, Judge Nowlin had no way of knowing what rewards or punishments Pierce may have wanted to heap on his associates. The entire redistricting issue had generated intense partisan interest by December 23, 1991, as was inevitable. For a judge of the court panel faced with resolving this controversy to privately call upon an elected member of the legislature for assistance in that task, regardless of how limited, would clearly have the appearance of impropriety for any reasonable observer.

Judge Nowlin and his family have unfortunately suffered considerably from the public accusation of corruption and evil motive. As noted above, we find no foundation for these charges. We do conclude, however, that Judge Nowlin's unthinking ex parte contact with Rep. Pierce and allowing Rep. Pierce to play a role in this sensitive redistricting case amounts to conduct inconsistent with Canons 2A and 3A(4) and prejudicial to the effective administration of the business of the courts in violation of 28 U.S.C. § 372(c)(1). For these reasons, we recommend that the Council reprimand Judge Nowlin for his conduct and caution him to exercise greater care in such matters in the future.

Respectfully submitted,

Chief Judge Henry A. Politz
Judge W. Eugene Davis (Chairman)
Judge Harold R. DeMoss, Jr.
Judge William Wayne Justice
Judge George P. Kazen